SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN (INDONESIA/MALAYSIA)

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Abstract

In 2002, the International Court of Justice concluded that based on sovereign activities (effectivités), Malaysia has sovereignty over the two islands Pulau Ligitan and Pulau Sipadan. The effectivités turned out to become the key element in the case. This paper argues that the Court has developed a series of principles and measurements governing the control of territory.However, since the international law reflects political conditions and eveloves, in most cases, in harmony with reality, it strengthens the importance of the use of peaceful mean in resolving territorial disputes in ASEAN.

Keywords: sovereignty,territory, dispute, effectivités, Indonsia and Malaysia

I. Introduction

On December 2002, the International Court of Justice issued its judgment on the case of the dispute between Indonesia and Malaysia concerning the sovereignty over Pulau Ligitan and Pulau Sipadan in the Celebes Sea (website Sovereignty over Pulau Ligitan and Pulau Sipadan). The both neighboring states agreed to settle the dispute by formulating a Special Agreement filed with the Court on 2 November 1998. In article 2 of the Special Agreement, the parties appeal the Court "to determine on the basis of the treaties, agreements and other evidence furnished by the Parties, whether sovereignty over Ligitan and Sipadan belong to the Republic Indonesia or Malaysia" (Judgment,1997). The Court concluded that Malaysia has sovereignty over the two islands on the basis of the "effectivités".

The dispute of the sovereignty over Ligitan and Sipadan is a territorial dispute which derived from an undesirable heritage from colonial period before the independences of the two parties. In terms of territorial disputes, according to David M.Ong, an analysis should be begun from identifying firstly, 'inchoate titles'

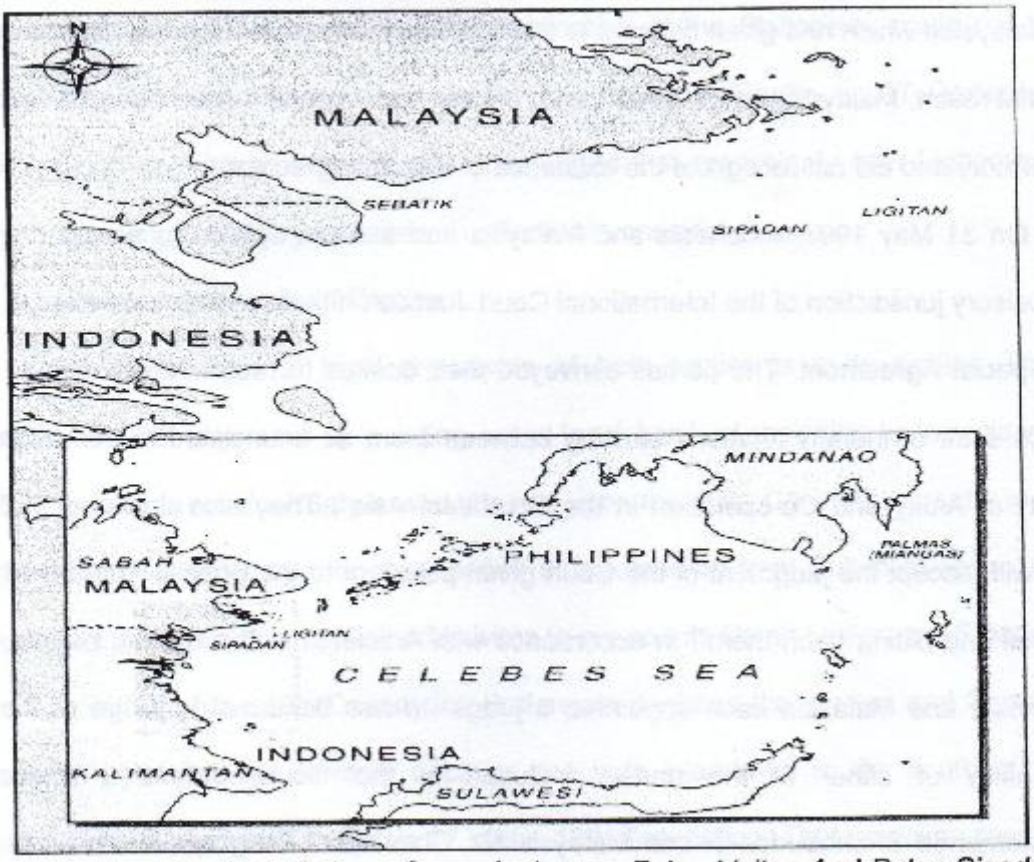
established by parties to the dispute territory, then actions reflecting existence of legal relation between parties and the dispute territory, and finally, application of the principle of inter-temporal law (David M. Ong,1999:404).

This writing will use the above approach to analyze the case of sovereignty over Ligitan and Sipadan. The legal issues that will be discussed are firstly, what the title attached by parties to the dispute territory was, and how the Court asses the title did. In international law, there is a number of territorial acquisition that can be used by parties namely, discovery, prescription, cession and adjudication (David M. Ong,1999:404). Secondly, how did the Court conclude that Malaysia has exercised sovereign rights over the islands? Why was critical date (See Malcom N. Shaw, 2003:431) limited before period 1969? The writing will present firstly the facts including procedures of the case, then legal argument of the parties, decision and legal reasoning of legal bodies and finally conclusion.

II. Facts

The islands of Ligitan and Sipadan (Pulau Ligitan and Pulau Sipadan) located in the Celebes Sea, off the northeastern coast of the island of Borneo and lie approximately 15.5 nautical miles apart are very small islands.(see Figure 1) Ligitan is slightly smaller in area than Sipadan. The square of Ligitan is approximately 7.9 hectares and Sipadan is about 16 hectares. Ligitan is located on the southern side of a reef system which includes Malaysia's inhibited Danawan and Si Amil Islands. Its co-ordinates are 4° 09' latitude north and 118° 53' longitude east and it is situated some 21 nautical miles from Tanjung Tutop, on the Semporna Peninsula, the nearest area on Borneo. The island with low-lying vegetation and some trees has never been inhibited but it is used by local people to dry fish. Sipadan, on the other hand, has been inhibited on a permanent basis when it was developed by Malaysia into a tourist resort for scuba-diving in the 1980s.

Figure 1: Map Pulau Ligitan and Pulau Sipadan in the Celebes Sea



Sources: David A. Colson, Sovereignty over Pulau Ligitan And Pulau Sipadan, AJIL, Vol.97,No.97, 2003

The dispute between parties over sovereignty of two islands initially appeared when Indonesia and Malaysia were negotiating their maritime boundaries in 1969. Their disagreements over the sovereignty of the islands were a main reason of their unsuccessful in reaching continental shelf delimitation agreements in the Celebes Sea.

This island constitutes a densely wooded island of volcanic origin and the top of a submarine mountain some 600 to 700 m in height, around which a coral atoll has formed. Its co-ordinates are 4° 06' latitude north and 118° 37' longitude east. It is located about 15 nautical miles from Tanjung Tutop, and 42 nautical miles from the east coast of the island of Sebatik .

However, according to Indonesia, there was 'an oral agreement' at that time between two parties which provided that the legal status of the two islands will be discussed at a later date and a status quo will be applied on the islands. In early June 1991, relied upon the oral agreement, the Indonesian government complained

the Malaysian which had given consent to a private company to develop the island as a tourist resort. Malaysia, on the other hand, argued that the island have been part of his territory and did not recognize the existence of the oral agreement.

On 31 May 1997, Indonesia and Malaysia had a same opinion to accept the compulsory jurisdiction of the International Court Justice on their dispute embodied in the Special Agreement. The parties conveyed their desires to reconcile the dispute "in the spirit of friendly relations existing between them as enunciated in the 1976 Treaty of Amity and Co-operation in the Southeast Asia". They also declared that they will "accept the judgment of the Court given pursuant to the Special Agreement as final and biding upon them". In accordance with Article 31 of the Court's Statute, Indonesia and Malaysia each appointed a judge *ad hoc* because no judge of the nationality of either of the parties included in the Court. Indonesia chose Mr. Mohamed Shahabuddeen and Malaysia Mr. Christopher Gregory Weeramantry. After Mr. Shahabuddeen had resigned, Indonesia chose Mr. Thomas Franck to replace him. Each of the Parties duly filed a Memorial, Counter-Memorial and Reply within the time-limits fixed by the Court.

The Court established an Order to arrange the time limit for the respective initial pleadings and the initial written pleadings. The Court accommodated the wishes expressed by the two parties in the Special Agreement that the written pleadings should consist of:

> "(a) a Memorial presented simultaneously by the parties not later than month after the notification of this Special Agreement to the Registry of the Court;
> (b) a Counter Memorial presented by each of the parties not later than 4 months after the date on which each has received the certified copy of the Memorial of the other party;
> (c) a Reply presented by each the parties not later than 4 month after the date on which each has received a certified copy of the Memorial of the other party; and
> (d) a Rejoinder, if the parties so agree or if the Court decides ex officio or at the request of one the parties that this part of the proceedings is necessary and the Court authorities or prescribes the presentation of the Rejoinder."

During Court process of the case, the Republic of the Philippines filed in the Registry of the Court an Application for permission to intervene in this case, on 13

March 2001, but Court found that the Application of the Philippines could not be granted by a Judgment rendered on 23 October 2001. Finally, on 17 December 2002, Court, by sixteen votes to one, has judged that sovereignty over Ligitan and Sipadan belongs to Malaysia based on effectivités consideration. .

III. Legal Arguments of Parties

A construction of legal arguments of both parties is quite similar. They established the argument by pointing out a legal basis of their title to the islands. While Indonesia used a treaty-based title rely upon the 1891 Convention as the legal basis, Malaysia advanced its claim based on succession from Sultan of Sulu. Like Indonesia, Malaysia also applies effectivités to support its tile on Ligitan and Sipadan.

By virtue of the 1891Convention, Indonesia declared that Ligitan and Sipadan are part of Indonesian territory because the both islands lie to the south of the parallel line, as provided in Article IV of the 1891Convention. That provision read as follows:

> *"From 4° 10' north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the island of Sebitik: that portion of the island situated to the north of the parallel shall belong unreservedly to British North Borneo Company, and the portion south of that parallel to the Netherlands"*

Indonesia argued that the 4° 10' north parallel of latitude is an allocation line which does not only distribute the mainland area between the parties, but it also regulates share out islands where the islands 'located to the north of the 4° 10' were belong to British and those lying to the south were Dutch'. Under the Convention, according to Indonesia, the Netherlands had title to the dispute islands and Indonesia, therefore, has sovereignty over Ligitan and Sipadan. Indonesia also relies on a series of effectivités, both Dutch and Indonesia to support its treaty-based title. Moreover, Indonesia affirmed, if its title based on the Convention 1891 was not accepted, that it would maintain over the dispute islands as successor to the Sultan Bulungan who had held authority over the islands.

Malaysia, on the other hand, preserved that the provision of Article IV of the Convention 1891 was intended to divide Sebatik and it also asserted that the 4° 10' north parallel of latitude ended in this island. Consequently, the Convention 1981 did not have effect to islands in the east included Ligitan and Sipadan.

The legal basis for the Malaysia sovereignty claim is based on an 1878 grant by the Sultan of Sulu to British company. According to Malaysia, the title to the dispute island exceeded, "in succession, to Spain, to the United States, to Great Britain an behalf of the State North Boneo, to the United Kingdom of Great Britain and Northern Ireland and, finally to Malaysia itself." It stressed that there is a certain number of British and Malaysian effectivités over the island which can support its claim over Ligitan and Sipadan. It also argued that this effectivités would have displaced any such Netherlands title, if the Court were to reject its claim.

IV. Decision and Reasoning of the Legal Body

The Court first came into a conclusion that Indonesia did not hold a treaty based title to the dispute islands. It found that the Convention 1891 between Great Britain and the Netherlands 'can not be interpreted as establishing an allocation line determining sovereignty over the islands out to sea the east of the Sebatik, as Indonesia claimed'. To support its conclusion, the Court presented the legal reasoning by referring to the rules of interpretation provided in the 1969 the Vienna Convention as follows. Firstly, the word "across" and the phrase "shall be continued eastward" in article IV were "not devoid of ambiguity". Thus, the Court noted that the ambiguity could have been circumvented if the parties had made it clear that the line in question was to provide as an allocation line east of Sebatik. Secondly, having examined the object and purpose of the 1891 Convention, there is no intention of the parties to 'delimit the boundary between their possessions to the east of the islands of Borneo and Sebatik or to attribute sovereignty over other islands.' Thirdly, the *travaux préparatoires*, subsequent practice or conduct of parties to the 1891

Convention and the cartographic material submitted by Indonesia supported the conclusion of the Court. In sum, the 1891 Convention determines the boundary between two parties up to the eastern of Sebatik Island.

The Court also rejected the succession-based title to Ligitan and Sipadan claimed by Indonesia and Malaysia. Having observed the various contracts concluded between the Netherlands and the Sultan Bulungan, the Court could not accept the legal reasoning contended by Indonesia that it came into a legacy the title to the dispute islands from the Netherlands through the cession. As well as Indonesia, Malaysia's contention that it has an interrupted series of transfer of title the alleged original title holder, Sultan of Sulu, to Malaysia could not ensure the Court. Although Malaysia presented the chain method to support its claim, but there were no contracts stated that Ligitan and Sipadan belong to the Sultan of Sulu and that 'any of the alleged subsequent title holders had a treaty-based title to the disputes islands'. In sum, neither Indonesia nor Malaysia held the title to the two islands based on the succession.

Having refusing the primary arguments of the parties, the Court, finally, exercised the effectivités contended by the parties as alternative basis of the title. In this regard, the Court provided a critical date and elements of effectivités. The critical date was 1969, the year in which the parties declared their sovereignty over Ligitan and Sipadan. Acts having taken after the critical date were not considered by the Court in support of its arguments relating to *effectivités*, unless 'such acts are a normal continuation of prior acts and are not taken for the purpose of improving legal position of the parties'. Then, to exercise activities of parties, the Court pointed out that the elements of effectivités applied by the Permanent Court in the 1933 Legal status of *East Greenland case* are relevant to Ligitan and Sipadan case. According to the Permanent Court, requirements of a claim to territory based on a continued display of authority are an intention to act as sovereign, accompanied by a display of that authority, and 'in the case of claims to sovereignty over areas in thinly populated

or unsettled countries, the other State could not make out a superior claim'. Moreover, the Court added that with regard to these two island regulation or administrative acts of a general nature can be considered as effectivités.

By using the elements of effectivités, the Court noted that the proof submitted by Indonesia did not constitute *a titre de souverain* reflecting an intention to act in that capacity. On the other hand, the Court concluded that the proof submitted by Malaysia supported its sovereign claim to Ligitan and Sipadan. Moreover, the Court notes that when 'the activities were carried out, neither Indonesia nor its predecessor, ever expressed disagreement or protest'. On the basis of the above assessment of effectivités, the Court judged that Malaysia has sovereignty over Ligitan and Sipadan. The comparison of activities of parties presented by parties as the proof of effectivités, can be seen in figure 1, as follows:

Figure 2: The Comparison of the Proof of effectivités

States	**Activities of parties (included legislative regulatory/administrative act)**	**Elements of Continued display of authority**	
		Actual exercise of sovereign	**Intentions/will to act as sovereign**
Indonesia	Act No.4 1960 (drawing Indonesia's archipelagic baseline but its map does not indicate the islands)	No	no
	Presence of the Dutch and Indonesia Navy around the island	No	no
	Activities of private person (fisherman)	No	no
Malaysia	BNBC* administration	Yes	yes
	Regulation of turtle eggs	Yes	yes
	The construction and operation of lighthouses	Yes	yes
	Navigational aid	Yes	yes
	No protest		

*the British North Borneo Company

V Conclusion

The treaty-based title to the dispute islands was rejected by the Court. It refused Indonesia's argument based on the 1891 Convention which is considered

only to govern the land border between the countries on mainland of Borneo. The 4° 10' parallel of latitude is narrowly interpreted to project out to the sea for distance of 3 miles from of Sebatik. The Court also rejected Malaysia's claim on the islands base on chain of title from the Sultan of Sulu. Thus, effectivités turned out to become the key element in the case. The Court judged that the proofs submitted by Malaysia were modest in number, but they were stronger than the proof submitted by Indonesia. It noted that they are diverse in character, cover a considerable period of time and were not protested by Indonesia. However, comparing the parties' effectivités was like 'trying to weigh precisely a handful of feathers against a handful of grass'.

The application of the critical date concept was very important in this dispute. By accepting Indonesia proposal that period before 1969 was critical date, the Court could easily identify activities of the parties reflecting as *a titre de souverain*. Moreover, the sensitive issues related to a scuba diving resort on Sipadan could be avoided.

Finally, from a procedural and institutional standpoint, the case has been settled not more than four years. The parties had committed to settle the dispute under ASEAN spirit as regulated in the Special Agreement. At the same time, the effort to resolve disputes through the International Court of Justice is the first case in this region. Hence, it strengthens the importance of the use of peaceful mean in resolving territorial disputes.

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